92-961

Supreme Court, U.S.
FILED
JUL 2 1992
OFFICE OF THE CLERK

No.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMES P. Mc GOVERN, pro se, and
SUSAN C. Mc GOVERN, pro se

Petitioners,

v.

TOWN OF WILTON,

Respondent.

Petition For Writ Of Certiorari To The
Supreme Court Of The State Of Connecticut

PETITION FOR WRIT OF CERTIORARI

JAMES P. Mc GOVERN, pro se
P. O. Box 7030
124 Old Highway
Wilton, Connecticut 06897
(203) 761-9987
SUSAN C. Mc GOVERN, pro se
124 Old Highway
Wilton, Connecticut 06897
(203) 761-9987
Petitioners, pro se

QUESTIONS PRESENTED

1. Were pro se Petitioners' fundamental Constitutional rights violated when the judges of the Connecticut Superior Court denied their motions for appointment of an impartial judge; to transfer; for equal treatment and equal protection as well as for due process?

2. Were pro se Petitioners' fundamental Constitutional rights violated when the Presiding Judge of the Connecticut Superior Court denied their motion for appointment of an impartial judge for the sole reason that "To grant this motion is tantamount to admitting corruption."?

3. Were pro se Petitioners' fundamental Constitutional rights violated when the judges of the Connecticut Courts continually demonstrated and practiced a "double standard" of bias against and to the detriment of pro se parties to the benefit of the "courthouse regulars" and their clients?

4. Were pro se Petitioners' fundamental Constitutional rights to notice violated when the judges of the Connecticut Appellate Court denied their Motion to Set Aside the Dismissal of the Appeal which was based upon denial of notice to them of their adversary's motion to dismiss the Appeal?

5. Were pro se Petitioners' fundamental Constitutional rights violated when the judges of the Connecticut Appellate Court demonstrated and practiced a "double standard" of bias against and to the detriment of pro se parties when the Clerk stated that "No conference would be held in this matter because appellants are pro se."?

LIST OF PARTIES

The parties to the proceeding below were the petitioners James P. Mc Govern and Susan C. Mc Govern and the respondent Town of Wilton as well as Village Bank & Trust Company and Union Trust Company.

The respondents before this Court include Town of Wilton as well as Village Bank & Trust Company and Union Trust Company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 4

CONSTITUTIONAL PROVISION INVOLVED 5

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 20

I. The decisions below which deny fundamental Constitutional rights conflict with decisions of this Court 20

CONCLUSION 32

APPENDIX A-1

1. Order on Petition for Certification to Appeal to Supreme Court of Connecticut A-1

2. Order denying Motion to Set Aside Dismissal of Appeal by Appellate Court of Connecticut A-2

3. Order granting Motion to Dismiss Appeal by Appellate Court of Connecticut A-3

4. Memorandum of Decision granting Motion for Summary Judgment A-4

TABLE OF AUTHORITIES

CONSTITUTION OF THE UNITED STATES,
AMENDMENT XIV .....passim

Cases: Page

Arizona v. Fulminante,
___ US ___ (1991) 22

Bartlett v. Krause,
209 Conn. 352 (1988) 28

Boykin v. Alabama,
395 U.S. 238 (1969) 31

Chapman v. California,
368 U.S. 18 (1967) 22

Connecticut v. Doehr,
111 S.Ct. 2105 (1991) 15,27

Farhoud v. Connecticut Commission on
Human Rights and Opportunities,
212 Conn. 802 (1989) 28

Griswold v. Connecticut
381 US 479 (1965) 28

Hart Twin Volvo Corporation v.
Commissioner of Motor Vehicles,
165 Conn. 42 (1973) 28

Jencks v. Phelps,
4 Conn. 149, 152 (1822) 29

Johnson v. Zerbst,
304 U.S. 458, 464 (1938) 30

Malinski v. New York,
324 US 401 (1945) 25

MARBURY v. MADISON,
1 CRANCH 137 (1803) 21,31

Mc Govern v. CCHRO, Town of Wilton,et al.
Connecticut Superior Court
docket No. REC-CV-90-0106617 11

Mc Govern v. Wilton Board of Education,
U.S.D.C., CT.No. B-90-333 JAC ...10,15

Moore v. Dempsey,
261 U.S. 86 (1923) 15,24,28

Morgan v. United States,
304 U.S. 1,18 (1938) 29

PALKO v. CONNECTICUT,
302 U.S.319 (1937) 24,26,28

Peralta v. Heights Medical Center, Inc.
108 S.Ct. 896 (1988) 29

Plessy v. Ferguson,
163 U.S. 537, 552, 559 (1896) 22

ROCHIN v. CALIFORNIA,
342 U.S. 165 (1952) 26

Snyder v. Massachusetts,
291 U.S. 97 (1934) 26

State v. Hewitt,
517 A.2d 820 (N. H. 1986) 31

Tumey v. Ohio,
273 U.S. 510, 535 (1927) ...15,22,23,24

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMES P. Mc GOVERN, pro se, and
SUSAN C. Mc GOVERN, pro se

Petitioners,

v.

TOWN OF WILTON,

Respondent.

Petition For Writ Of Certiorari To The

Supreme Court Of The State Of Connecticut

The petitioners, James P. Mc Govern and Susan C. Mc Govern, respectfully pray that a writ of certiorari issue to review the Order on Petition for Certification to Appeal of the Supreme Court of the State of Connecticut, entered in this proceeding on April 3, 1992, the Order which denies the Motion to set aside the Order of Dismissal entered on February 14, 1992 and the Order which grants the Motion to Dismiss entered on January 9, 1992.

OPINIONS BELOW

The Order on Petition for Certification to Appeal of the Supreme Court of the State of Connecticut has not been reported. It is reprinted in the Appendix hereto, p. A-1, infra.

The Order which denies the Motion of Defendant-Appellant to set aside the Order of Dismissal by the Appellate Court has not been reported. It is reprinted in the Appendix hereto, p. A-2, infra.

The Order which grants the Motion of Plaintiff-Appellee to Dismiss the Appeal has not been reported. It is reprinted in the Appendix hereto, p. A-3, infra.

The Memorandum of Decision which grants Plaintiff's Motion for Summary Judgment has not been reported. It is reprinted in the Appendix hereto, p. A-4, infra.

JURISDICTION

The Supreme Court of the United States has jurisdiction over this matter under the Fourteenth Amendment to the Constitution of the United States. A review of the proceedings below will reveal the sham which resulted in the denial of Petitioners' fundamental Constitutional rights by the Superior Court where Petitioners filed motions for appointment of an impartial judge, to transfer and invoked their fundamental rights to equal treatment, equal protection and due process; and by the Appellate Court which denied Petitioners' motion to set aside the dismissal of the appeal for the reason that Petitioners had no notice of the adversary's motion

to dismiss the appeal. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment

"All persons born or naturalized in the United states, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Procedural Background

This suit was filed by Town Counsel for Town of Wilton. The Complaint recites causes of action for unpaid real estate taxes. The Amended Answer, Counterclaim and Third Party Complaint as well as the Second Amended Answer, Counterclaim and Third Party Complaint recite claims arising out of the age discriminatory denial of employment and subsequent harassment, intimidation and retaliation. In February, 1991, a Summary Judgment was entered in favor of Town. In April, 1991 the Motion to set aside that Judgment was denied. Prior to the expiry of the time to Appeal Town Counsel filed additional requests for relief. In June, 1991 a Judgment of Foreclosure by Sale was

entered in favor of Town. In September, 1991 the Motion to set aside that Judgment was denied.

Petitioners filed numerous Motions to Recuse as well as four Motions for Appointment of an Impartial Judge and to transfer to a neutral forum. No objection or caselaw memo was filed by Town Counsel. Prior to the entry of Judgment in February, Petitioners' had raised the question of denial of their fundamental Constitutional rights to Equal Treatment; Equal Protection; Notice; an Impartial Judge and Due Process.

The Appeal was dismissed by the Appelate Court. A Motion to set aside the Order of Dismissal was denied in February, 1992. A Petition for

Certiorari was denied by the Supreme Court of Connecticut on April 3, 1992.

Factual Background

Petitioners purchased their residence in Wilton, Connecticut in 1977.

Town's Case

Town of Wilton claims that certain annual real estate taxes were not paid.

Petitioners' Case

Prior to receipt of the Summons in this action, Respondents received no notice from the Town concerning a problem with taxes. Petitoners refinanced the first mortgage in late 1986. Petitioners do not know where the Tax Collector sent notices. Town Counsel has demonstrated a propensity to misdirect Motions and Requests in this case. There is now a sign in the Tax Collector's office which

states that even if you do not receive tax notices you must pay taxes.

Petitioners are citizens by birth in New York City. They have been married since 1965. S. Mc Govern returned to the workforce after J. Mc Govern was stricken by cancer. S. Mc Govern, who had more than ten years teaching experience, sought employment in Wilton's public schools as an elementary classroom teacher. She was denied full-time employment. In August, 1988, she filed Age Discrimination charges with the federal EEOC and state CCHRO against the Town and its public school system. Petitioners are parties plaintiff in two other proceedings in which Town of Wilton and its public school system are parties defendant.

In brief, this is a SLAPP suit filed by the lawyers for Town of Wilton, Messrs. Patchen, Hefferan and partners, as part of a conspiracy to harass, intimidate and retaliate against S. Mc Govern and her spouse, J. Mc Govern because she filed charges with the Connecticut Commission on Human Rights and Opportunities and the Equal Employment Opportunity Commission charging Town of Wilton, Wilton Board of Education, Wilton Public Schools, et al., with age discrimination in employment.

Those matters are currently pending in a suit filed as SUSAN C. Mc GOVERN and JAMES P. Mc GOVERN v. Wilton Board of Education, et al., in U.S.D.C., District of Connecticut at New Haven, Civil Action No. B - 90 - 333 JAC. Town Counsel, H. Hefferan, J. Patchen and their lawfirm

as well as other co-conspirators are charged with violations of the provisions of the Age Discrimination in Employment Act, including harassmnet, intimidation and retaliation and with violations of the Civil Rights Act of 1871.

Mc Govern v. CCHRO, Town of Wilton, Wilton Public Schools, etc., docket No. REC-CV-90-0106617 S, is an administrative appeal pending in the Connecticut Superior Court in Stamford, CT.

By tieing up Petitioners' primary asset in this litigation, Respondent's have stultified Petitioners' ability to refinance in order to hire competent litigators to pursue their discrimination and civil rights claims.

As a result of their involvement in this case and that administrative appeal,

Petitioners have responded to numerous Short Calendar calls in the Stamford Superior Court, on average more than once per month between January, 1990 and April, 1992. They have observed and brought to the attention of the Judges and Presiding Judge in Stamford Superior Court a pattern and practice of bias by the judges and court officials against and to the detriment of Petitioners and othe pro se parties and to the benefit of the "courthouse regulars" and their clients. Approximately sixty (60) such incidents were reported in moving papers filed by Petitioners who demanded and filed motions to transfer and for appointment of an impartial judge. Petitioners have been victimized by ex parte deals by which "Town Counsel"

arranged to set aside six interlocutory orders of default in favor of S.Mc Govern against the Town, its Board of Education, et al.; to delete S. Mc Govern's address from the computer which prints court calendars; to "lose" J. Mc Govern's Appearance from April 16, 1990 until October 10, 1990; to have the Judges of the Superior Court "omit" to act on numerous motions for sanctions and a motion to compel a hearing concerning Constitutional irregularities in the administrative appeal; to send notices and motions for default against the bank to the Executive Offices of the banks which hold Petitioners' first and second mortgages despite the fact that lawyers filed Appearances for each bank many months before; to have Judge Katz grant

an amendment to the Complaint in this action which was not printed on the Short Calendar; to have Judge Nardi-Riddle grant an amendment to the Complaint in this action which was not printed on the Short Calendar; to "mark ready" motions made by Petitioners which Petitioners had "marked off" both by telephone and by written notice; to arrange the denial of virtually every motion made by Petitioners despite the fact that Town Counsel did not file any caselaw memo or written objection to the motions.

On September 3, 1991 Presiding Judge Mottolese denied Petitioners' Fourth Motion to appoint an impartial judge and to transfer this matter to a neutral forum. His reason was "To grant this motion is tantamount to admitting

corruption." No written objection or caselaw memo was filed in opposition.

One blatant instance is the insistence by Town Counsel to proceed before Judge Nardi-Riddle for an Order of Foreclosure by Sale on June 10, 1991. Wilton's lawyer was well aware that Judge Nardi-Riddle is the same person as Clarine Nardi-Riddle, the former Attorney General, whose name was signed to pleadings filed by our adversaries in SUSAN C. Mc GOVERN and JAMES P. Mc GOVERN v. Wilton Board of Education, et al., cited above. Petitióner moved that Judge Nardi-Riddle recuse herself; recited from Chief Justice Taft's opinion in Tumey v. Ohio; Moore v. Dempsey and Connecticut v. Doehr; and demanded to halt the proceedings until an impartial judge was

appointed. While Judge Nardi-Riddle denied or refused to consider Petitioners' motions which were filed with and authenticated by the Clerk of the Court she granted Wilton's amendment to the Complaint which was not previously filed with or authenticated by the Clerk nor was it printed on that Short Calendar. On June 24, 1991, Judge Nardi-Riddle consented to recuse herself.

Petitoners were required to file their appeal ten days prior to the expiry of their statutory appeal time in order to prevent the sale of their residence. Motions to extend the date of the "Foreclosure Sale" until the time to appeal expired were denied by Judges Mottolese and Nigro. Notice of the intended foreclosure sale was published

subsequent to a special hearing arranged by Town Counsel at which Town Counsel argued that the Superior Court should authorize the sale because "We already paid for advertising the Notice of Sale."

Town Counsel, a "Courthouse regular", is not required to obey "the Rules" to which pro se Petitioner is strictly held. When challenged on his deal with the Clerk to "Mark Ready" motions made by Petitioner even though he had written notice that Petitioner had marked them off, Town Counsel was excused by saying "I did not understand the rule." A double standard prevails.

Judge Nigro announced that a statutory stay was mandated because Petitioners had filed the Notice of Appeal.

Town Counsel chose not to accept a set of the appeal documents which was offered to him in the Courthouse that day. The case was printed on the Short Calendar for the two Mondays after the Appeal was filed.

Town Counsel filed a Motion to Dismiss the Appeal but did not send a copy to either Petitioner. Five days after he filed that Motion, Town Counsel's secretary obtained J. Mc Govern's telephonic consent to an extension of time for Town Counsel to file motions but no motions were received from Town Counsel. Neither Petitioner saw Town Counsel's Motion to Dismiss until it was purchased from the Clerk after the appeal was dismissed by the Appellate Court.

Petitioners' motion to set aside that Dismissal for lack of notice was denied. Wilton's Town Counsel filed no objection. The denial of the Motion to set aside is pro forma boilerplate. No legal reason is given. The order denying certiorari by the Connecticut Supreme Court is also boilerplate. No legal reason is given.

The Court must be advised that Joseph Patchen, the Assistant Town Counsel who filed the Complaint, has not been so employed since at least September, 1990. Lovejoy, Hefferan, Rimer & Cuneo was dismissed as Wilton Town Counsel in late 1991.

The questions presented for review were not decided.

REASONS FOR GRANTING THE WRIT

Petitioners are citizens of the United States. Petitioners are entitled to all of the rights, privileges and immunities set forth in the Constitution, including but not limited to the fundamental rights to due process, to equal protection of the laws, to equal treatment, to a trial before an impartial judge and to notice. All of those rights have been denied as a result of the double standard which favors the "Courthouse regulars" and their clients to the detriment of pro se parties.

The decisions below conflict with the decisions of this Court.

THE LAW

"Thus, the paricular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument." MARBURY v. MADISON, 1 CRANCH 137 (1803),MARHALL,C.J.

A pro se party is not a second-class citizen.

"But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil

rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." Plessy v. Ferguson, 163 U.S. 537, 552, 559 (1896) Harlan, J.,

Petitioners have a Constitutional right to an impartial judge. Tumey v. Ohio was ratified in Chapman v. California, 368 U.S. 18 (1967) and was further ratified in Arizona v. Fulminante, No. 89-839 (1991) by the Opinions signed by Rehnquist, C.J. and White,J.

"No matter what the evidence against him, he had the right to have an impartial judge. He seasonably raised

the objection and was entitled to halt the trial because of the disqualification of the judge which existed". 273 U.S. 510, 535 (1927).

Chief Justice Taft's Opinion recites its history in the English Common Law.

Petitioners have a Constitutional right to due process before Wilton can sell our home. They intend to drive us out of town. They attempted to poison our relationship with the banks which hold the mortgages by sending Motions for Default against the banks to their executive offices months after lawyers had filed Appearances for each bank. The hearings were a sham.

"When a state deprives a person of liberty or property through a hearing held under statutes and circumstances

which necessarily interfere with the course of justice, it deprives that person of liberty and property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.", Moore v. Dempsey, 261 U.S. 86, Tumey supra 511. "Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial... The hearing, moreover, must be a real one, not a sham or pretense. [Moore v. Dempsey 261 U.S. 86 (1923)] ". Palko v. Connecticut, 302 U.S.319 (1937), CARDOZO,J. This matter has devolved into a sham.

The Supreme Court must review the whole course of this suit and consider that it was brought as a facade to harass,

intimidate and retaliate against Petitioners and to tie up our primary asset so that we could not refinance to hire competent litigators in the civil rights cases. What has transpired is unconscionable.

"Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [...] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." [Malinski v. New York, 324 U.S. 401 (1945)]. ..Due process of law is a summarized constitutional guarantee of respect for those personal

immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," [Snyder v. Massachusetts, 291 U.S. 97 (1934)], or are "implicit in the concept of ordered liberty." [Palko v. Connecticut, 302 U.S.319 (1937)] Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this [dismissal] was obtained do more than offend some fastidious squeamishness or private sentimalism. This is conduct that shocks the conscience." Rochin v. California, 342 U.S. 165 (1952), FRANKFURTER,J.

Connecticut "procedure" is not superior to the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States. "[T]he Connecticut provision before us, by failing to [...], clearly falls short of the requirements of due process." Connecticut v. Doehr, 111 S.Ct. 2105, 2116 (1991), White, J. "I agree with the Court that the Connecticut [...] statute, 'as applied in this case' ... fails to satisfy the Due Process Clause of the Fourteenth Amendment." 111 S.Ct. 2105, 2120 (1991). Rehnquist, C.J., concurring. "I agree that it validity under the Due Process Clause should be determined by applying the test we set forth ..and I agree that it fails the test." 111 S.Ct. 2105, 2123 (1991).

Scalia J.,concurring. Cf. Palko, supra and Griswold v. Connecticut 381 US 479 (1965)

The standard is EQUAL JUSTICE FOR ALL, Petitioners did not waive our fundamental Constitutional right to EQUAL TREATMENT. We are entitled to NOTICE and due process of law before we are deprived of our property. See Hart Twin Volvo Corporation v. Commissioner of Motor Vehicles, 165 Conn. 42 (1973). See also Moore v. Dempsey, supra.; Bartlett v. Krause, 209 Conn. 352, 377 (1988); Farhoud v. Connecticut Commission on Human Rights and Opportunities, 212 Conn. 802, 15 CLT14, p. 221, (1989). Berdon,J.

It is impossible to respond to a Motion to Dismiss when one has never received it. "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." Morgan v. United States, 304 U.S. 1,18 (1938),

As early as 1822, the Supreme Court of Connecticut established the rule concerning notice. See Jencks v. Phelps, 4 Conn. 149, 152 (1822). "[N]otice, actual or constructive, is the foundation of due process." See Peralta v. Heights Medical Center, Inc. 108 S.Ct. 896, 899 (1988).

Petitioners did not waive our fundamental Constitutional right to NOTICE and the other elements of Due Process and Equal Treatment when we filed Appearances in this case. "[C]ourts indulge every resonable presumption against waiver' of fundamental constitutional rights and ...'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Before the Court grants any Motion to Dismiss it must canvass the matter with Petitioners "to make sure he has a full

understanding of [a waiver] and its consequences," Boykin v. Alabama, 395 U.S. 238, 244 (1969), before finding that any waiver is knowing and intelligent and, more importantly, intentional. [...] See 498 F.2d 390,392 (6th Cir. 1974). [..] 446 F.2d 876, 877 (9th Cir. 1971). See State v. Hewitt, 517 A.2d 820 (N. H. 1986) Souter, J.

The law governing this case has not changed. The Fourteenth Amendment to the Constitution is the law of the land. Connecticut must comply. See Marbury, supra.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that a writ of certiorari be granted to review the decisions of the Connecticut courts.

Respectfully submitted,

JAMES P. Mc GOVERN, pro se
P. O. Box 7030
124 Old Highway
Wilton, Connecticut 06897
(203) 761-9987
SUSAN C. Mc GOVERN, pro se
124 Old Highway
Wilton, Connecticut 06897
(203) 761-9987
Petitioners, pro se

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-91-0524

Town of Wilton

v.

James P. Mc Govern et al.

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendants for certification to appeal from the Appellate Court, it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT

s/ Alan M. Gannuscio
ASSISTANT CLERK-APPELLATE

Dated: April 3, 1992

STATE OF CONNECTICUT

APPELLATE COURT

NO. A.C. 10658 February 13, 1992

Town of Wilton

v.

James P. Mc Govern et al.

ORDER

THE MOTION OF THE DEFENDANT-APPELLANT TO SET ASIDE ORDER OF DISMISSAL, HAVING BEEN FILED ON JANUARY 28, 1992 AND HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT

s/ Carolyn Cunha Ziogas
for PAUL S. HARTAN
ASSISTANT CLERK-APPELLATE

NOTICE SENT: 2/14/1992

STATE OF CONNECTICUT

APPELLATE COURT

NO. A.C. 10658 January 9, 1992

Town of Wilton

v.

James P. Mc Govern et al.

ORDER

THE PLAINTIFF-APPELLEE'S MOTION TO DISMISS, HAVING BEEN FILED ON OCTOBER 7, 1991. HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

ORDERED GRANTED.

BY THE COURT

_____

ASSISTANT CLERK-APPELLATE

NOTICE SENT: 1/10/1992

D.N. CV89 0104538 S (SUPERIOR COURT
TOWN OF WILTON (STAMFORD/NORWALK
VS (JUDICIAL DISTRICT
(AT STAMFORD
JAMES MCGOVERN ET AL (FEBRUARY 4, 1991

MEMORANDUM OF DECISION

The plaintiff's complaint, dated October 18, 1989, seeks a foreclosure of municipal tax liens for real estate taxes owed by the defendants, James and Susan Mc Govern, to the Town of Wilton. The defendants filed ana answer to the complaint on or about December 8, 1989, and the nfiled an amended answer, counterclaim and setoff on or about January 22, 1990. In response, the plaintiff Town of Wilton filed a request to revise on or about May 25, 1990, seeking to delete all four counts of the

counterclaim and setoff. The defendants failed to file any objection to the request to revise within thirty (30) days. Pursuant to Practice Book S149, the plaintiff's request to revise is, therefore, automatically granted, and the defendants' counterclaim and setoff are deleted as a matter of law. It follows that the only substantive pleadings before this court for purposes of this motion for summary judgment are the complaint and the answer. The defendant, Union Trust Company, which has an interest in the property by virtue of a mortgage, filed a disclosure of no defense on or about February 16, 1990. The defendant, Village Bank and Trust Company, which also has an interest in the property by virtue of a mortgage,

also filed a disclosure of no defense, but reserved its rights with respect to whether the foreclosure should be strict or by sale, etc.

The defendants, James and Susan McGovern, in their answer, admitted their ownership and possession of the subject premises, known as 124 Old Highway in Wilton. The only remaining issues raised by the pleadings are whether the taxes were duly and properly assessed, and for what years, whether the taxes have been fully paid, and whether there are tax liens on the property.

Connecticut General Statutes S12-111 provides aremedy to those persosns claiming to be aggrieved by the acts of the tax assessors, by providing for an appeal to the Board of Tax Review. In

addition, Conn. Gen. Stat. S12-118 provides for an appeal to the Superior Court to any person aggrieved by a decision of the Board of Tax Review. This appeal may be taken within two months of the decision of the Board of Tax Review. In addition, Conn. Gen. Stat. S12-119 provides a remedy when property is wrongfully assessed by allowing the owner or lessee of the property to make an application forrelief to the Superior Court within one year from the date of the last tax evaluation of the property. In the case of Norwich v. Lebanon, 200 Conn. 697 (1986) the court set out the method of obtaining relief from an illegal or excessive assessment.

This court declared in Norwich I that relief from an illegal or excessive assesment is obtainable only (1) by appeal to the board of tax review and then by a further appeal within two months, to the Superior Court pursuant to SS12-111 and 12-118 or (2) by an action in court pursuant to S12-119 within one year from the last valuation date. Id at 707.

The Norwich court went on to state:

"We have frequently held that whwere a statute has established a procedure to redress a paricular wrong a person must follow the specified remedy and may not institute a proceeding that might have been permissible in the absence of such a statutory procedure. LaCroix v. Board of Education, 199 Conn.70,78, 5050 A.2d1233

(1986).'Where the General Assembly has established complete, adequate and ststutory remedies for alleged tax irregularities, a taxpayer must exhaust the." Hoffman v. Colorado State Board of Assessment, 683 P.2d 783,785 (Colo. 1984) Id. at 708-709.

There is no question of fact as to whether the defendant exercised his right to appeal the tax assessment. Because he failed to exercise his right of appeal, within the statutory time limit, he has waived that right. Therefore, there is no question of fact as to the due proper assessment of the tax.

Additionally, in his affidavit attached to his memorandum in opposition to summary judgment, Mc Govern "denies receiving any notice from the Wilton tax

collector that taxes had been assessed .... or that taxes were not paid prior to the institution of this lawsuit." Counteraffidavit, S30.

The lawsuit was instituted by complaint dated October 18, 1989. The sheriff's return is dated November 18, 1989. The plaintiff attached a copy of a demand letter and affidavit dated October 10th, 1989, to its memorandum in support of its motion. The tax collector's attached affidavit states that the taxes stated in count one of the complaint, due on July 1, 1986, and January 1, 1987, were paid subsequent to the filing of the instant lawsuit. Taxes due on July 1, 1987 and forward through January 1, 1990, duly and properly assessed, have not been paid, according to the affidavit.

A moving party is entitled to judgment as a matter of law if the court would grant a directed verdict on the same evidence. Nolan v.Bankawski, 206 Conn.495,500 (1988). The burden is on the movant, the evidence must be viewed in the light most favorable to the nonmovant and he is given the benefit of all favorable inferences that can be drawn. Evans Products Co. v. Clinton Binding Supply, Inc., 174 Conn.512, 516 (1978). It is only after the movant has met this burden that the opponent bears the burden of presenting facts which contradict those offered by the movant. Citizens National Bank v. Habney, 182 Conn.310, 311 (1980).

It is not enough, however, for the opposing party merely to assert the

existence of such a disputed issue. Mere assertions of fact...are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book S380.

State v. Goggin,208 Conn. 606 616 (1988).

Mere assertions of fact...are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book S380.

(citations omitted)

Hammer v. Lumberman's Mutual Casualty Co. 214 Conn 573, 579 (1990).

To oppose a motion for summary judgment successfully, the defendants must recite specific facts...which contradict those stated in plaintiff's

affidavits and documents.

Farrell v. Farrell, 182 Conn. 34, 39-40 (1980)

The McGoverns have failed to recite specific and material facts which contradict those stated in the plaintiff's affidavits on the issue of payment as set forth in counts two through four. Certified copies of the tax liens have also been provided and the defendants have equally failed to sufficiently refute the plaintiff's proof on that issue. Therefore, no material fact exists as to whether the amounts owed have been paid and whether there are tax liens on the property.

Accordingly, the plaintiff's motion for summary judgment is granted. Costs of $230.20 and counsel fees of $3,000 are awarded. _____ KATZ, J.